UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/25667
26 April 1993

ORIGINAL: ENGLISH

LETTER DATED 26 APRIL 1993 FROM THE CHARGE D'AFFAIRES A.I. OF THE PERMANENT MISSION OF NEW ZEALAND TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

I have the honour to refer to the statement of the Security Council adopted on 31 March 1993 (S/25493) concerning your report on "An agenda for peace" and the issue of the safety and security of United Nations forces and personnel. You will recall that in that statement the Security Council requested you to report as soon as possible on existing arrangements for the protection of United Nations forces and personnel, and the adequacy thereof, taking into account relevant multilateral instruments and status-of-forces agreements concluded between the United Nations and host countries, as well as comments you may receive from Member States, and to make such recommendations as you consider appropriate for enhancing the safety of United Nations forces and personnel.

I have the honour to enclose the comments of the New Zealand Government for consideration in connection with the above report.

I will also be providing the enclosed paper as New Zealand's observations and suggestions submitted in accordance with paragraph 60 of General Assembly resolution 47/71 entitled "Comprehensive review of the whole question of peace-keeping operations in all their aspects", for consideration by the Special Committee on Peace-keeping Operations at its current session.

I should be grateful if you would circulate this letter and its enclosure as a document of the Security Council.

(Signed) J. W. McKINNON
Chargé d'affaires a.i.

Annex

Security and safety of United Nations forces and personnel

Background

1. The Secretary-General, in his report entitled "An agenda for peace" (S/24111), indicated that there had been "an unconscionable increase in the number of fatalities amongst United Nations personnel engaged in peace-keeping". He identified a "pressing need to afford adequate protection to United Nations personnel" and called on the Security Council to "gravely consider what action should be taken towards those who put United Nations personnel in danger".

2. In its resolution 47/72, the General Assembly requested the Special Committee on Peace-keeping Operations to study measures to ensure the safety of peace-keeping and other United Nations personnel.

3. Responding to the Secretary-General's request, the Security Council took up the question of measures for the protection of United Nations personnel in March 1993. The Council, in a presidential statement on 31 March 1993 (S/25493):

(a) Indicated that attacks and other acts of violence, whether actual or threatened, including obstruction or detention of persons, against United Nations forces and personnel were wholly unacceptable;

(b) Demanded that States and other parties to various conflicts take all possible steps to ensure the protection of United Nations forces and personnel;

(c) Demanded that States act promptly and effectively to deter, prosecute and punish all those responsible for attacks and other acts of violence against United Nations forces and personnel;

(d) Recognized that particular difficulties and dangers arose where United Nations forces and personnel were deployed in situations where the State or States concerned were unable or unwilling to exercise jurisdiction in order to protect such forces;

(e) Indicated that attacks on United Nations forces and personnel might require the Council to take further measures to ensure the safety and security of United Nations forces and personnel;

(f) Requested the Secretary-General to report on measures for improving the protection of United Nations forces and personnel and invited Member States to contribute comments to the Secretary-General to assist in the preparation of his report.

Comments of the Government of New Zealand

4. The following comments by New Zealand are submitted pursuant to the invitation to assist the Secretary-General contained in document S/25493.

5. They are also circulated for the assistance of members of the Special Committee on Peace-keeping Operations to contribute to discussion of the Committee's mandate under General Assembly resolution 47/72.

Comments on existing arrangements for protection and safety

6. United Nations forces and personnel are normally deployed following the conclusion of a standard status-of-forces agreement between the United Nations and the State or States concerned. (The text of the model status-of-forces agreement is set out in document A/45/594.) These status-of-forces agreements draw on the 1946 Convention on the Privileges and Immunities of the United Nations. a/ The 1947 Convention on the Privileges and Immunities of the Specialized Agencies b/ is also applicable to certain personnel associated with peace-keeping operations. The Charter of the United Nations itself is also relevant, including Article 105.

7. The current legal framework for the protection of United Nations peace-keeping personnel is therefore a complex web of obligations set out in bilateral and multilateral agreements and customary rules of international law. From an examination of these bilateral and multilateral instruments the following general conclusions can be drawn:

(a) Existing obligations confer responsibility on States in all cases involving United Nations forces and personnel to ensure the prosecution of persons subject to their jurisdiction who are accused of acts of violence to or obstruction of United Nations forces and personnel;

(b) United Nations forces and personnel are in all cases accorded special international status;

(c) Members of United Nations forces and United Nations personnel are, in certain limited cases, accorded the status of internationally protected persons and are thereby covered by the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; c/

(d) There are anomalies, inconsistencies and gaps in the legal framework;

(e) The obligations do not exist in a single coherent and up-to-date document.

General responsibility upon States under international law

8. The anomalies and inadequacies of current legal instruments create a serious risk that those who seek to frustrate United Nations peace-keeping operations will believe they can act with impunity and if challenged, may try to cast doubt on the existence of applicable norms of international law.

9. As the above analysis indicates, the basic principle of State responsibility under international law for the safety and security of United

Nations forces and personnel is clearly established, although there are variations in the scope of this norm.

10. It is the view of the New Zealand Government that, in addition to the specific treaty-based obligations that exist in international law, there also already exist in international law parallel norms of customary international law. These oblige all States in whose territory peace-keeping forces are deployed to ensure that United Nations forces and personnel are not obstructed in carrying out their Security Council mandate. Violence and the use of force against United Nations forces and personnel would be the clearest and most graphic example of a violation of these norms and must therefore be considered as also prescribed under customary international law.

11. The view of the New Zealand Government is based not only on the existence of a network of principles and obligations contained in current multilateral and bilateral treaty instruments, but also in the practice of the United Nations, as evidenced in resolutions of the General Assembly and specific demands by the Security Council, and the practice of Member States. It is founded also on the proposition that all States Members of the United Nations undertook, in Article 25 of the Charter, to carry out in good faith the decisions of the Security Council. Where the Security Council takes action or adopts measures involving the deployment of a peace-keeping force, a mandate is established. Attempts to frustrate, delay or obstruct such a mandate, including by the use of force against United Nations personnel are inconsistent with good-faith performance of the obligations undertaken in Article 25 and in some cases, Article 49 of the Charter.

12. In summary, New Zealand believes that the relevant principles and obligations in customary international law can be stated as follows:

(a) States are obliged to take the necessary measures to ensure that Security Council mandates are not obstructed or frustrated and, in particular that United Nations personnel operating pursuant to mandates are not subject to obstruction, detention or the use of force;

(b) The use of force against United Nations personnel engages international legal responsibility and constitutes a violation of obligations owed collectively to all Member States and to the United Nations itself;

(c) States' obligations extend to taking action promptly to deter, prosecute and punish all those responsible for the use of force against United Nations personnel.

Situations where States are unable to exercise responsibility

13. The Security Council has established mandates for peace-keeping and peace enforcement in an increasing number of situations where the traditional assumptions about peace-keeping no longer apply. Thus, in Somalia there is no functioning Government to assume bilateral responsibilities under a status-of-forces agreement or discharge obligations under international law. In other cases one or more of the parties to the conflict which has given rise to the United Nations deployment are not States or recognized entities capable of

entering into treaty relations or assuming responsibilities under international law. In such cases the international community may not reasonably be able to expect a State to assume responsibility for the actions of such entities.

14. Where a Government is unable to carry out obligations to protect United Nations personnel, for example where it has lost control of a part of its territory or, in extreme cases, where there is no Government, the Security Council is faced with responding, in an ad hoc way, to attacks on United Nations personnel. But recent examples (resolution 804 (1993) on Angola and resolution 792 (1992) on Cambodia) indicate the limited options at the Council's disposal. As the General Assembly recognized in resolution 47/72 the Security Council may be faced with situations where its only option is to exercise enforcement powers under Chapter VII - to take sanctions or use force in appropriate cases where safety is threatened by provocative action.

15. In essence the current situation leaves the United Nations, when confronted with attacks on its forces or personnel, with the difficult choice of either allowing its mandate to be frustrated or escalating the level of measures. Confronted with a situation in which there is no local legal system to detain, try and punish offenders, United Nations forces on the ground will need to resort to increasingly robust rules of engagement.

The case for individual responsibility

16. The view of the New Zealand Government is that the case for holding personally responsible those who violate obligations regarding the safety of United Nations forces and personnel is compelling. There is a very strong parallel with the "grave breaches" concept in international humanitarian law. The Geneva Conventions d/ establish the principle of individual criminal responsibility, subject to universal jurisdiction, for offences in a conflict situation against civilians and military forces that are for various reasons no longer combatants. This can include wounded, prisoners and medical personnel.

17. The situation of United Nations peace-keeping and related personnel has many similarities. But United Nations forces and personnel are not covered by the Geneva Conventions. Nevertheless United Nations forces are deployed into zones of actual or potential conflict. However, peace-keeping forces are not combatants and the civilian component is certainly never combatant.

18. New Zealand believes that there is every reason for ensuring that international law protecting United Nations forces and personnel is no less effective than international law protecting the soldiers actually engaged in fighting a war. The inclusion in the United Nations legal framework of measures giving United Nations forces and civilian personnel protection equivalent to the "grave breaches regime" should therefore be a high priority.

Action required

19. The view of the New Zealand Government is that action is required at several levels within the United Nations system to enhance the safety and security of United Nations forces and personnel:

(a) A restatement of the United Nations expectations of Member States is urgently required. A clear, concise and coherent statement of the current rules of international law and the obligations of Member States in a single document should be of significant practical assistance;

(b) Every new mandate approved by the Security Council should contain provisions which draw specific attention to the statement of United Nations expectations regarding the safety and security of United Nations forces and personnel. This could take the form of an annex to the relevant resolution which could be adapted to meet specific situations. Such provisions could also be included in future status-of-forces agreements between the United Nations and host countries;

(c) Further development of the legal framework is also essential. This could include provisions to deal with jurisdiction over persons who violate norms of international law governing the protection of United Nations forces and personnel in circumstances where no State can assume responsibility for detention, trial and punishment of such violations. In such cases, if jurisdiction was able to be exercised internationally, on the basis of individual responsibility, there would be less incentive to use lethal force in the field and less need for the Security Council to consider the graver options of resort to Chapter VII action;

(d) Restructuring in United Nations Headquarters is needed to establish a capability to predict, assess and respond to situations in the field likely to result in threats to United Nations personnel.

Modalities

20. New Zealand proposes that:

(a) A declaration be adopted, if possible jointly or in parallel, by the Security Council and the General Assembly. Such a declaration would constitute the restatement referred to in paragraph 19 above. Desirably the text should be formulated in cooperation between the Special Committee and the Security Council;

(b) A process be established to review and update the legal framework applicable to United Nations forces and personnel bearing in mind the consultations outlined in paragraphs 21 to 23 below;

(c) A Convention should be developed to codify and further develop international law relating to the protection and safety of United Nations forces and personnel dealing in its elaboration with the principle that peace-keepers should be at least as well protected as combatants.

The problem of the non-State party to a conflict

21. Increasingly United Nations forces and personnel are deployed under mandates which require them to "keep the peace" in a situation of armed conflict between a Government and a faction or movement within a State. As discussed

above, there are problems in such cases in relying upon treaty-based instruments for the application of rules and norms of international law. Under classical principles of international law entities that are not States are not subjects of international law. It is simplistic simply to rely on multilateral conventions for establishing rules applicable in such conflicts. Almost by definition the entities in question will not be able to become party to such instruments and, in some cases, they may seek to exploit this situation and ignore the applicable principles of international law. The real issue is how jurisdiction may be exercised over such people in situations where States cannot impose territorial jurisdiction.

22. New Zealand believes that it is important therefore that the process of development of United Nations law in the area of protection and safety of United Nations forces and personnel not be limited to the traditional multilateral convention. Innovative processes for the development of international law are called for. In this regard New Zealand notes that the binding legal powers of the Security Council coupled with the moral authority of the General Assembly, if used in cooperation and with determination, offer the possibility, in the special case of peace-keeping forces and personnel, for the creation of very effective norms. Such a process has the potential to overcome the constraints of a purely treaty-based approach.

23. With the above in mind, New Zealand suggests that the declaration which it has proposed be subject to revision and updating in the light of experience and with a view, in particular, to incorporating norms that will be applicable to and enforceable upon all the participants whether States or other entities in conflicts where the United Nations is called upon to keep the peace.

Notes

a/ General Assembly resolution 22 A (I).

b/ General Assembly resolution 179 (II).

c/ United Nations Treaty Series, vol. 1035, No. 15410.

d/ Ibid., vol. 75, Nos. 970-973.